

**Town of Fitzwilliam  
Zoning Board of Adjustment  
Meeting Minutes  
May 28, 2019**

**Members Present:** Gretchen Wittenborg, Vice Chairman; Bob Handy and Chad Beede, Members; Dan Sutton, Alternate, seated for Cathy Davis vacant seat; Susan Massin, Alternate; and Dan Baker, Selectmen's Representative.

**Members Absent:** Steve Filipi, Chairman.

**Other's Present:** Jon Le Claire; Phyllis Spicer, David Spicer; Patricia Spicer, owners; Jeanne Drugg, abutter, and her son, Herb Drugg; Christine Fillmore, Attorney for the Town of Fitzwilliam; Charley Kenison, Board of Selectmen; and Laurie Hayward, Land Use Administrative Assistant (LUA).

**Call to Order:** The Chair called the meeting to order at 7:01 PM.

**Public Hearing:**

The Acting Chair, Gretchen Wittenborg, opened the Continuance of the Public Hearing, reading the notice of hearing:

**"7:00 PM. Public Hearing. ZBA Case # 19-01, David & Phyllis Spicer application for Special Exception** Amended to a Variance to allow a 30' x 23'11" expansion of the dwelling at 12 Spicer Point, on Laurel Lake, in the Wetlands Protection Overlay District, Tax Map 21, Lot 19.1, in the Rural District, reference Zoning Ordinance 127-19.f. to allow a 4-foot setback where a 20-foot setback is required."

**Owners' Questions and Statements.** David Spicer asked why the original application was changed from an appeal for a Special Exception to a Variance. He cited the section referenced in the original application for Special Exception, 127-19. f. that allows appeals for dimensional reductions for porches or additions to existing buildings by Special Exceptions. Spicer stated that he feels the Board is not handling his case consistent with its ordinances and he questioned their request that the application be resubmitted as a Variance. Wittenborg stated that the Board would be working through Mr. Spicer's question about whether this is appropriate as a Special Exception or a Variance during this hearing. Mrs. Spicer asked who on the Board pushed for the change to a Variance. Sutton spoke, stating that he was one of the individuals who pushed for the change from an application for Special Exception to Variance. Sutton explained that he felt the original general section cited that does use Special Exception, 127-19. f., but is not as appropriate as Section 127-136.B which deals with non-conforming structures, which their house is. Sutton stated that it is his understanding that, when you have a general provision that applies and a specific provision that applies, but differs; it is clearly the specific provision that is used. The specific provision cited calls out changes to a non-conforming structure and requires that the existing structure conform to all dimensional requirements and this existing structure does not. That led the Board to believe that a Variance was required not a Special Exception. Sutton explained that the setback issue on a non-conforming property required a variance. Mrs. Spicer asked why the Board was taking so long to make a decision. Sutton explained that part of the length of time involves the fact that the Board

did ask for a new application for a variance and there were many questions regarding the site, the septic system, and the legal questions surrounding the case.

**Which section of the Fitzwilliam Zoning Ordinance applies?** Mr. Spicer stated that he still feels his reading of the ordinance allows him to build. Sutton reiterated that 127-36. B. does say that you cannot change a non-conforming structure unless it complies with all dimensional requirements. Wittenborg clarified that the original application was a Special Exception application under 127-19. f. and the subsequent application made as an appeal for a Variance under 127-36. B. Mr. Spicer questioned whether the application for Variance was actually made under 127-36. B. The LUA checked the actual application and confirmed that the application for a Variance was submitted under 127-36. B.

Christine Fillmore pointed out that exemptions from the dimensional requirements are only allowed when the existing structure conforms to the dimensional requirements of the zoning ordinance. *[Reference Fitzwilliam Zoning Ordinance 127-36. B., Non-conforming Structures. Changing a non-conforming structure.]* Mr. Spicer asked if Sutton was saying that the fact that there was a dimensional requirement that wasn't met is the reason that the board requested the change from a Special Exception to a Variance. Sutton agreed that is the case.

**Which, State Statute or Fitzwilliam Zoning Ordinance applies?** Spicer continued to express skepticism regarding what section of state statutes and town ordinance should be used. Fillmore stated that the Ordinance controls and she explained that the ordinance is specific about the expansion of a nonconforming structure. Spicer stated that he understands that now. Spicer addressed Wittenborg explaining that he is questioning the meaning of "substantial use" based on RSA 674:19 and RSA 674:16 not applying to existing buildings. Spicer quoted from *RSA 674:19* which says: "A zoning ordinance adopted under *RSA 674:16* shall not apply to existing structures or to the existing use of any building. It shall apply to any alteration of a building for use for a purpose or in a manner which is substantially different from the use to which it was put before alteration." Spicer asked whether "expansion" in that statute applies to the use or to the alteration. Fillmore stated that it applies to both. She further stated that the way the Supreme Court in New Hampshire has used this is to say that in cases where there is something specific in the local ordinance, that controls. Fillmore explained that the Fitzwilliam town ordinance uses language that includes the expansion of a nonconforming structure. Fillmore explained that the town is allowed to be a bit more expansive in its approach. The Fitzwilliam Ordinance does look at the expansion of a structure and does not permit expansion in all cases. Expansion of a non-conforming structure is not permitted if the expansion itself doesn't conform to all the dimensional requirements in the zoning ordinance; therefore, a variance is needed. She noted that an expansion can be expansion of a use or of a structure or of a combination of both. Spicer asked for confirmation that there is acknowledgement that the use doesn't change. Fillmore agreed but clarified that the Ordinance looks at the ways that a non-conforming structure be changed to trigger the requirement for a Variance. Use is not the issue. The use is as a residence and will remain as a residence. However, the ordinance specifically calls out non-conforming structures and requires structural change conform to all dimensional requirements; therefore, there is no question about which portion of the ordinance applies.

Wittenborg read from case law regarding the New Hampshire case *Granite State Minerals Inc. vs. the City of Portsmouth* which was about an appeal to add three stories to an already existing structure which

already violated setbacks. It was determined to be a different use of the existing structure and with a substantially different impact on the neighborhood.

**Paul Grasewicz written points regarding the Spicer Proposal.** Grasewicz could not be at the hearing; but he did provide a letter. Wittenborg referred to the Grasewicz letter dated May 28, 2019. Wittenborg pointed out that the letter provided some additional dimensional information that had not previously been provided. Wittenborg read from the Grasewicz letter. The Letter states:

“This letter is written in response to the e-mail that I received at the end of last week requesting additional information. Jon Le Claire has calculated the roof area(s) as requested, which is shown below. For the record, this was the first time that this information has been requested. My plans have always shown the existing and proposed building footprint, information which is consistent with every other plan (for other projects) that I have previously submitted to the Board of Adjustment. I have gone back to the site to take a couple of measurements to provide the requested ‘important measurements’ referenced in Laurie Hayward’s e-mail.

- Roof area(s): Old roof=658.5 sq. ft.; New roof=585 sq. ft.; Total roof=1,243.5 sq. ft.
- Closest distance from Laurel Lake to the house: 7 feet (Annual high water) to house (the porch). Note that the existing deck is at the lake edge.
- The distance from the addition (and existing house) to the side lot line is 4 feet, as shown on the plan. The fence was built by the Spicers approximately 6 inches from the property line.
- Septic system to Drugg boundary: The existing David Spicer system (to be replaced) is approximately 7 feet from the lot line, and the newer advanced Pat Spicer system is 10 feet from the boundary (as per NHDES approval).
- Distance to the Drugg’s well: The existing David Spicer system (to be replaced) is approximately 36 feet from the well; Pat Spicer’s new EDA for the advanced treatment system (as exists) is approximately 43 feet from the well. Note that any addition to this system (to replace David’s existing system) will be further away (48’+). Although none of these dimensional concerns (except for the existing and proposed building side-setback as shown), are of any relevance to the variance request at hand, they are hereby provided as requested.”

Wittenborg pointed out that the information on dimensions is relevant and was requested because, despite previous requests the only plans specifically provided with the Variance application did not have necessary dimensions or scale. Handy added that the well radius was not shown on the plan. Le Claire pointed out that the March 15, 2019 plan for the Special Exception Application did have a scale on the plan along with the Grasewicz stamp on it.

**Septic systems and Density questions.** Spicer asked whether the Board was aware that there has been a waiver of the 75-foot set-back of septic systems to wells [*for the Drugg well*] that has been recorded with the Cheshire County Registry of Deeds. Wittenborg stated that she does know that. Herb Drugg spoke, explaining the history of the well radius waiver. He stated that his mother understood that the system for 10 Spicer was to be 68 feet from their well. Mr. Drugg told members that his mother wanted to be a good neighbor and signed the waiver. It turns out that the septic system for 10 Spicer is more like 36 to 43 feet from the Drugg well. Spicer stated that it is his 30-year old septic system for 12 Spicer that he is getting rid

of that is 36 feet from the Drugg well. Spicer added that they will tie into the new system that is in place for 10 Spicer. Both houses will share the system.

Spicer used the example of the system that his sister-in-law, Jacqueline Wood had on her lot. He told Members that the state approved "the Wood" system at 25 feet from a well. Mr. Spicer added that means that their septic system is far beyond that which would be approved by the state. Mr. Drugg pointed out that the 25-foot well distance likely had a DES waiver and DES likely will approve anything where there is a release of liability for possible well failure due to a septic system too close to the well.

Wittenborg then took up the Grasewicz communication of May 7, 2019 which included a "Position Paper" which included a Neighborhood Lot Density Analysis and a response to Drugg family Concerns Raised at the previous ZBA meetings and information on the ownership of the property. Members had seen; but, did not have copies. Spicer handed out copies.

**Density in the surrounding area.** Wittenborg stated that there is no way to determine the usefulness of the Density Analysis, how inclusive it is and where it starts and stops, without a sketch or tax map which flags the properties used in the analysis. Spicer explained that the numbers of the density report provided include that square-footage of the footprint of houses and comes directly from Avitar [*the Fitzwilliam third-party tax assessor*]. Spicer stated that the lot square-footage is out of Cheshire County Registry of Deeds and is based on dimensions of the lots. He further stated that no porches, open porches, or decks are included in the density list that they provided. Lots listed are on the lake from boat landing to swim club. Handy spoke explaining that all those listed are existing properties. Mr. Drugg asked to speak. He explained that it is his belief that the neighboring properties have not been expanding. Sutton questioned that. Le Claire stated that his sister-in-law, Jacqueline Wood, did go to the ZBA and obtained ZBA approval to tear-down and replace a house in the same neighborhood.

There was a question posed regarding the number of properties around the lake that have received a variance and have expanded on the lake. Wittenborg did not know; but, did state that the other house on the lot, 10 Spicer Point, did receive a Construction Permit and did not come before the ZBA. To that point Le Claire stated that his sister-in-law Jacqueline Wood did get a variance from the ZBA for her house on the same lake.

**Change of Use or Change/Expansion of Structure and the concept "substantially different".** Wittenborg mentioned that the size of the house is significantly changed, but neither Grasewicz nor Le Claire has provided exact dimensions, despite numerous requests. Le Claire stated that at the last meeting an estimate was made. He added that he knew the question would arise, so brought the numbers. Le Claire stated that the current house with porch is 1191 sq. ft. The new addition is 1176 sq. ft. which brings the whole to a total of 2367 sq. ft. Mr. Spicer stated that the Drugg property is non-conforming as well as his is and in violation of the side setback. Spicer also stated that his building is the smallest house in the neighborhood and if you double the size of it, it still is not near the bigger houses. Spicer offered to get a tax map and better identify the properties on the Density Analysis. Sutton asked about the density list and whether the Analysis left any houses out. Spicer said "no". Sutton asked for confirmation that the proposed addition would make the total square-footage of 12 Spicer Point 2367 sq. ft. Both Mr. Spicer and

Le Claire agreed that is true. Sutton pointed out that would make the proposed dwelling the second largest on the list. Spicer pointed out that his list was based on the footprint not the total square-footage.

Wittenborg explained that 'Contention 2' in Grasewicz's Position Paper is in reference to Margaret Byrnes' [Byrnes is an Attorney with New Hampshire Municipal Association] email response to a request for legal advice regarding existing structures and uses of property/structures are protected from zoning changes and what constitutes a change that is 'substantially different', such that they will be subject to zoning and require a variance. Wittenborg noted that Grasewicz questioned whether there was a change of use in this case. Wittenborg stated that the Board does not agree with the Grasewicz position as Attorney Fillmore has already explained. Wittenborg cited New Hampshire case law, noting that Hurley v Town of Hollis which includes tests for evaluating change that look for "natural" expansion and whether there is a substantial impact on neighboring properties and Devaney v Town of Windham regarding the expansion of a building footprint of an existing non-conforming structure and, finally Shopland v Enfield which involved doubling the footprint of a nonconforming house within a setback and required a variance. Wittenborg stated that she feels these cases dispose of Grasewicz' argument that a variance is not required.

Phyllis Spicer pointed out that there is an important underlying reason for the proposed addition and that she has fallen on the stairs multiple times and has back problems that requires that she have access to a downstairs bedroom.

**Wittenborg called for any additional input, stating that the Board is near the point that the Public portion will be closed and the Board will begin Deliberations.**

**Abutter's Concerns.** Herb Drugg asked to speak to the issue of the criteria for a Variance to be approved. Mrs. Spicer objected to him speaking for his mother. Board Members agreed that his mother was seated next to him and it is perfectly appropriate for her to speak. Fillmore also supported his right to speak on his mother's behalf. Mr. Drugg addressed the criteria for a Variance and the way he sees the issues with the proposed addition reviewing the criteria as follows: 1. Regarding **Public Interest**, he believes it is not in the public interest, pointing out wording in the Master Plan regarding protecting large supplies of surface water, open space, and the importance of Shoreland protection. He specifically noted that the Planning Board is currently working on drafting Shoreland Protection language which shows the level of public interest in this subject. 2. **The Spirit of the ordinance** is not observed because the proposed expansion cuts the distance of the setback in half and places their deck roughly 10 feet from the proposed addition. 3. **Substantial Justice is not done** because the applicant has more use of his property than any other property in the area. 4. **Value of surrounding properties not diminished** is not true in this case. His mother's property will definitely be affected and diminished by the proposed expansion. 5. **Regarding hardship**, he questions the claim that there is hardship that makes the proposed expansion the sole option. Mr. Drugg explained that the proposed structure will result in an additional 480 sq. ft. falling within the setback area more than doubling the amount within the setback. He pointed out that the property can still be reasonably used in strict conformance with the ordinance without the expansion.

Wittenborg asked for response to Mr. Drugg's objections. Le Claire replied that he did not believe that the addition will be that close to the Drugg house. Wittenborg asked to view the plan. Le Claire showed Board Members the plan and stated this showed the proposed addition was not within 10 feet. It was pointed

out that the Drugg deck was not shown on the plan. It was noted that the scale on the map that Grasewicz prepared was described incorrectly on the plan as 20 feet when it was actually 10 feet. Wittenborg asked Mr. Drugg to show where their deck is on the plan. Drugg stated that the stake for the corner of the proposed addition is roughly even with the front of the deck. Board Members remembered noting the closeness when they did a Site Walk on the property. The photos seemed to substantiate Mr. Drugg's claims regarding the roughly 10-foot span from proposed structure to the Drugg deck. Spicer showed a photo of the stake and the deck from his house. Board Members viewed several different photos that showed the closest portion of the Drugg house and the current Drugg decks in relation to the current house and some with stakes showing the proposed location of the addition to the Spicer house.

Mrs. Spicer asked if she could address Mrs. Drugg. Mrs. Spicer asked Mrs. Drugg, the owner/abutter, what it is that she wants. Mrs. Drugg said that the addition is too close to their house.

Wittenborg told Mrs. Spicer that they are about to close the hearing. Mr. Spicer spoke, he noted that all of their plans must be approved by the state. Wittenborg added that the town Planning Board may have to approve as well. Mr. Spicer explained that he cannot add to the structure any other way than the way proposed and that is the hardship. He stated that he has no options due to the non-conforming nature of the lot and that is the hardship. Mr. Spicer suggested using the Supreme Court concept "as the whole" which he stated means that the use should be considered the same. Wittenborg stated that members are aware of that concept.

**Wittenborg called for a motion to close the public hearing. Sutton moved that the hearing be closed and Members go into deliberations. Wittenborg seconded and it was voted unanimously to close the meeting and go into deliberations.**

Wittenborg noted her sympathy for the Spicers in that the property is a difficult site. She also understands Mrs. Drugg's concern because this is a big addition and very close to her property.

**Board Members opened a discussion of the five criteria needed for a decision:**

**Not Contrary to Public Interest.** There was a discussion about the concerns regarding the impact to the quality of the lake water. Beede spoke about the applicant's plan for mitigation of runoff. He noted that Grasewicz had explained that in a previous hearing. Beede also noted that the proposed addition will not be moving the dwelling closer to the shoreline. Sutton added that the proposed expansion of a nonconforming structure is important and has an impact on safety, including fire protection.

**The Spirit of the Ordinance.** Beede stated that he feels this goes against the Spirit of the ordinance. He noted the close proximity of the proposed addition to the abutter's deck. Sutton noted that the question of impact to values goes two ways the abutter might lose while other neighborhood value is enhanced by an updated building. Wittenborg noted the significant change in size with the new addition is a consideration. Sutton noted the importance of open space and safety, especially in case of fire, is included in both the Master Plan and the Ordinance. Wittenborg noted that this was citing the Purpose of Zoning as laid out in the Zoning Ordinance. Sutton stated that he feels for that reason the spirit is not met. Handy noted how tight he found the site even before the house is expanded and how little space

there is to expand the leach field. Wittenborg expressed that she feels the current non-conformance and the limits placed on expansion of non-conforming situations is a consideration as well.

**Substantial Justice is done.** Wittenborg and Sutton both noted that there is a balance between whether justice is done or not done. There are both gains and losses. Sutton explained that he couldn't conclude that substantial justice wouldn't be done by allowing the variance; nor could he find a basis to conclude that substantial justice would be done. There was a brief discussion about how to weigh the competing interests in considering the balance of justice.

Beede and Fillmore both offered that if, under New Hampshire law, in the absence of the variance an injury is done to a neighbor, then the loss to the individual that is not outweighed by gain to the general public is an injustice.

**Value of surrounding properties not diminished.** There was a discussion about the question whether it would increase or decrease values. Beede noted that it is not entirely clear to him that the remodel of the house with an addition wouldn't increase some local home values. Handy noted that he feels it would decrease the value of the Drugg property.

**Enforcement Results in Unnecessary Hardship.** Wittenborg cited the Ordinance regarding "unnecessary hardship": Section 127-42. E. 2. "Unnecessary hardship means that owing to special conditions of the property that distinguish it from other properties in the area: a. no fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property; and b. the proposed use is a reasonable one."

**Wittenborg suggested they close deliberations; Sutton moved to close discussion and move to a vote on criteria, it was voted unanimously.**

Regarding the first criterion it was noted that they had discussed that there will be mitigation and that the structure will not move closer to the water. Wittenborg noted that the size of the expansion does give concern regarding overcrowding. Sutton noted that he feels that is more a Spirit of the Ordinance issue.

Fillmore asked Wittenborg what the Board's process is for making a decision. Wittenborg stated that they make a determination on each individual criterion. Fillmore suggested that they not cut deliberations short until they have addressed each of the five criteria fully.

The LUA asked the Board to clarify for her whether they are still in deliberations or have moved on to take a vote.

Sutton explained that he did move to take a vote and now he finds they have more to discuss. **Sutton moved voted to return to deliberations and Wittenborg seconded the motion. It was unanimously voted to return to deliberations.**

Sutton noted his sympathy to Mrs. Spicer. Sutton explained that in looking at "hardship" he just can't believe that with all that architects can do these days, there is not a plan that can provide her with a safe

space that does not have provisions that will enhance her safety and well-being without negatively impacting the neighboring property and without requiring the same expansion.

**Sutton moved to close deliberations and vote on the criteria for decision; Wittenborg seconded the motion and it was voted unanimously to vote on the criteria for the decision.** It was noted that there would be only four votes as Massin was not seated because she did not hear all of the testimony given at any of the other meetings.

**ZBA case 19-01 Variance Vote:**

The Board discussed and voted on the five mandatory criteria set forth at Section 127-42E of the Zoning Ordinance as follows:

1. **The variance will not be contrary to the public interest. Unanimously voted “yes”.** Beede spoke about the applicants’ plans to use a drywell and gutters to control run-off from the structure and noted that the building will not be closer to the shoreline, so that water quality should not be affected.
2. **The spirit of the Ordinance is observed. Unanimously voted “no”.** Beede stated that he feels that this project goes against the spirit of the Zoning Ordinance and noted the close proximity of the proposed addition to the abutter Drugg’s house and deck. Wittenborg cited the language in the purpose clause at Section 127-2 of the Zoning Ordinance and noted that that the proposed project causes the structure to be substantially less conforming than the current dwelling. Sutton also referred to the purpose clause and commented that increasing the size of an already non-conforming structure on a densely-constructed, non-conforming lot ran counter to the Zoning Ordinance’s stated objectives to secure fire safety, preservation of natural resources and facilitation of adequate open space.
3. **Substantial Justice is done. Unanimously voted “no”.** Beede stated that in considering this criterion, the Board is guided by the principle that any loss to the individual that is not outweighed by a gain to the general public is an injustice. Wittenborg and Sutton both noted that there are gains and losses that have to be balanced. Allowing the variance would provide Applicants with a larger house, but denial would prevent the encroachment of a larger, non-conforming structure on the immediate abutting property and increased density of structures on Laurel Lake. Since Applicants’ use and enjoyment of their current non-conforming structure would continue unaffected by denial of the variance, the gain to the general public outweighs any loss to Applicants.
4. **The value of surrounding properties are not diminished. Unanimously voted “no”.** Beede and Sutton acknowledged the theoretical possibility that remodeling of Applicants’ dwelling might increase the value of some neighboring properties, but Handy said the expansion of the subject structure would clearly decrease the value of the immediately abutting Drugg property. All members agreed with Handy.
5. **Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship. Unanimously voted “no.”** Several members of the Board stated that the inability to build precisely what is desired does not constitute a hardship. While members expressed sympathy with Applicants’ desire to create a first-floor bedroom for health and safety reasons, Wittenborg pointed out that the proposed addition would make the property substantially more non-conforming, and Sutton and Handy said that they were not persuaded by the record in this case that there are not



*Minutes approved as written June 11, 2019*

other ways for Applicants to increase their living space and achieve their health and safety objectives consistent with the dimensional requirement of the Zoning Ordinance.

**Wittenborg stated that the Variance is denied and the Applicant and Owners will receive the Notice of Decision in a couple of days.**

It was agreed not to take up the minutes from previous hearings at this point.

The LUA confirmed with Fillmore that the Applicant has thirty days to file an appeal. Alternatively, the Applicant may file a new Application as long as the proposal is significantly different from the denied application proposal.

**There was no further business, and it was voted unanimously that the meeting be adjourned at 9:01 PM.** There were no new applications, so no future meeting date is provided.

Respectfully Submitted,

Laurie Hayward  
Land Use Administrative Assistant